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91-1547

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

L. OBIOMA AHAM-NEZE,
Petitioner,

v.

SOHIO SUPPLY COMPANY, ADDAX OVERSEAS S.A. OF PANAMA, PALIME NAVIGATION COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is consistent with the purpose and goal of Federal Rules of Appellate Procedure Rules 3(c) and the spirit of liberal construction and interpretation of these rules to find, as the Court below did in this case, that Petitioner's intention to seek review of the District Court's Order of October 22, 1990, denying his Motion for Reconsideration was not manifest, because he did not file a "functional equivalent" of a notice of appeal.

2. Whether the liberal interpretation provided by the Court of Appeals decision in reaching the conclusion that CTC's intention to appeal was clear, directly and flatly contradicts the narrow and restrictive result reached in regard to this Petitioner's intention to seek review.

3. Whether to the extent that *Torres* inflexible construction of Rule 3(c) of F.R.A.P. compels a harsh and unjust result at odds with the traditional notion of fairness and substantial justice under jurisdictional due process inquiry implicitly codified in Rule 2 of F.R.A.P., it was wrongly decided.

4. Whether Petitioner's co-counsel's deliberate and manipulative intention to defeat Petitioner's basis of jurisdiction in the Court of Appeals by purposefully filing a defective notice of appeal as to Petitioner's individual right, contrary to an oral agreement evidenced by his signing of Petitioner's signature on the notice, and by deliberately concealing his brief on appeal from this Petitioner, offends traditional sense of due process and notice requirement and constitutes a fraud upon the Third Circuit Court of Appeals.

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IN THE
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L. OBIOMA AHAM-NEZE,

Petitioner,

v.

SOHIO SUPPLY COMPANY, ADDAX OVERSEAS S.A. OF PANAMA, PALIME NAVIGATION COMPANY,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW **L. OBIOMA AHAM-NEZE**, Petitioner in the above styled and captioned cause, and respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the THIRD CIRCUIT entered on December 19, 1991.

OPINION BELOW

On December 19, 1991, the Court of Appeals for the Third Circuit handed down an opinion in which it regarded itself without jurisdiction to entertain Petitioner's Appeal, for "failure to file a timely notice of appeal" or any paper that could serve as a "functional equivalent" of such a notice. [A copy of the December 19, 1991 opinion is attached herein as Appendix "A"].[1]

JURISDICTION

The opinion of the Court of Appeals *sub judice* was delivered on December 19, 1991. [Appx. "A"] Jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1) and in the alternative, pursuant to the common-law All Writs Statute under Title 28, United States Code, Section 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

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Rule 2. Suspension of Rules

1No other Petitioner is involved in this Petition. The complaint as it was originally filed named the Defendants listed in Appendix A. Sohio Supply Company (a wholly owned subsidiary of British petroleum), Addax Overseas S.A. of Panama and Palime Navigation Co. (apparently omitted in the Court of Appeals caption) entered their appearance voluntarily. These three respondents later filed a joint Motion for sanctions. They are therefore the only Respondents named herein for the purposes of this petition.

Rule 3(b) Joint or consolidated appeals.

Rule 3(c) Content of the Notice of Appeal

Rule 25(b) Filing and service

Rule 25(d) Proof of Service

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition

a. The District Court Level

Plaintiff CTC Imports and Exports filed a complaint in admiralty arresting the M/V Vytina for illegal diversion of the cargo (approximately 774,000 barrels of crude oil) consigned to it by the officials of the Nigerian National Petroleum Corporation (NNPC). The District Court (Honorable Norma Shapiro) heard an emergency argument and by a stipulation agreed to by *all the parties*, vacated the arrest of the M/V Vytina and at the same time ordered commencement of discovery.[2] The District Court (per Louis

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2 Petition was approached for the *first time* about this case on the evening of March 8, 1989 by Plaintiff, John Indakaw,the President of CTC Imports Exports, Inc. in Houston. Plaintiff claimed he bought approximately 774,000 barrels of crude oil from Nigeria from the official of the Nigerian National Petroleum Corporation. After carefully examining and questioning plaintiff, petitioner thought CTC may have a colorable claim of fraud at least against Nigerian National Petroleum Corporation. The next day March 9, 1989, *Petitioner began his investigation only to be told by plaintiff that the vessel M/V Vytina* which was originally scheduled to arrive on the Gulf Coast around the 13th of March was to arrive the next day. Pressed for time and fresh out of school with no office or staff or even the know-how, petitioner referred this case on March 10th, a period of barely one and one half days, to an

Bechtel, C.J.) dismissed the complaint without prejudice for failure of Plaintiff's attorney, Simon Tache, to file a verified complaint pursuant to Admiralty Rule C(2). The Respondents thereafter brought a joint motion for sanctions against Plaintiff's counsel Simon Tache, and this Petitioner under Rule 11 and Section 1927 of 28 U.S.C., respectively.

On April 27, 1990, the District Court granted Respondent's motions and imposed sanctions on Plaintiff's counsel Simon Tache and Petitioner, and Plaintiff CTC. Liability was imposed jointly and severally. Simon Tache and this Petitioner filed separate and individual motions to reconsider. CTC did not. Petitioner's motion for reconsideration was filed on July 2, 1990. The motions were denied by the District Court in a joint order without opinion on October 22, 1990. All three parties: CTC, this Petitioner and Simon Tache appealed. A notice of appeal was filed on November 21, 1990 on behalf of all three, or at least that was the intention.

b. Decision of the Court of Appeals Below

On December 19, 1991, after this Petitioner had briefed and argued the entire merits of the sanctions against him as "Appellant", Circuit Judge Nygard, speaking for other members of the panel (Judges Mansmann and Rooney), handed down an opinion which dismissed Petitioner's appeal, for "failing to file a timely notice of appeal" or any paper in the record that could serve as "a functional equivalent" thereof. [See Appendix "A" at 6] Failure of the notice to

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accomplished expert in the field of admiralty law, Mr. Simon Tache, who was more seasoned with bills of lading. Petitioner briefed Mr. Tache thoroughly disclosing *every* and *all facts* related to him by plaintiff. At an emergency hearing to vacate the M/V Vytina, on March 16, 1989, the Honorable Judge Shapiro found that Plaintiff had a case and ordered immediate discovery. Petitioner shortly thereafter entered his appearance.

designate Petitioner in his individual capacity, the Court of Appeals below concluded, constituted a jurisdictional bar under the U.S. Supreme Court's ruling in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), and thus fatal, making Petitioner liable in the process for over $250,000 being claimed by Defendants' attorneys in fees and sundry costs. *Id.*[3]

On January 2, 1992, Petitioner promptly and timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. By an order dated January 17, 1992 the Petition for Rehearing and Suggestion for Rehearing En Banc was denied. [A copy of that order is attached herein as Appendix "B".] Petitioner moved on January 23, 1992 for a stay of mandate pending this Court's consideration of this writ.

B. Statement of Facts Relevant to Notice of Appeal

On or about October 25, 1990, Petitioner called Simon Tache, Esq., regarding the order of the District Court entered on October 22, 1990, which denied their respective motions for reconsideration. Petitioner there and then expressed his intention to appeal this order in his individual capacity to Mr. Tache. The sole purpose for calling Mr. Tache was to know whether he was interested in

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3During oral argument the Appellees who had brought the sanctions were asked this most simple question: "What would you have done differently from Plaintiff's counsel given their circumstances?" The arguing counsel stunned the Court by replying that he would have done nothing differently. This candor, it is respectfully submitted, belonged to Plaintiff's counsel before the Motion for Sanctions was brought, not after it. And this fact was well known to the Respondents' counsel. At this time, Rule 2 of the Appellate procedure should have been triggered even if the notice of appeal was defective, because of the egregious nature of this conduct. But the Court below, despite this "candid" admission, refused to consider Petitioner's appeal.

consolidating their appeal pursuant to Rule 3(b) of F.R.A.P.[4] Tache expressed his interest in so doing and said the reason he filed a separate motion to reconsider in the first place was because the Petitioner was out of the country when he filed his motion in May, 1990, and that time was really of the essence. It was agreed that since Petitioner lived in Houston, Texas and Mr. Tache in Philadelphia, that it would be best if Mr. Tache maximized his proximity to the court house by filing the notice of appeal on behalf of all three parties in their respective and individual capacities and that it should be done as quickly as possible. It was further agreed between this Petitioner and Mr. Tache that Mr. Tache would take care of the administrative materials including the filing of the appendix and any other materials needing urgent attention. Petitioner on his part would write all the briefs in the case, including the reply and letter briefs.

The notice of appeal in this case was filed on the last day that it was due: November 21, 1990. As evidence of the parties' agreement, Mr. Tache signed Petitioner's signature on the notice of appeal. But unbeknownst to this Petitioner, Mr. Tache had no intention of complying with the agreement. Instead of outrightly letting Petitioner know that fact, he led Petitioner into believing that he would give the notice of appeal in the manner indicated, *i.e.*, in the respective capacities of the parties. Petitioner relied on this gentlemen's agreement and proceeded to research for their brief. The result was the notice of appeal now in issue.

Upon receipt of the notice of appeal the Clerk of the Court of Appeals promptly sent to this Petitioner docketing materials, which included a civil information sheet. At this time Petitioner had not received the notice of appeal filed by Mr. Tache but assumed that the agreement as to the three

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4Given the volume of materials involved in this case, (the appendix filed on appeal was in excess of 2,000 pages), the costs of handling this appeal was an important factor on Petitioner's mind at the time. Besides, the issues in this case arose out of the same facts.

parties appealing was intact and therefore proceeded to designate, as the Court of Appeals had on that sheet, himself and co-counsel Petitioner as counsels for Plaintiff. The civil information sheet filed by this Petitioner presented the exact same issues as that in his motion for reconsideration and later on, on the appellate brief:

> (1) Whether the District Court's finding that Appellants' case was frivolous from the start, thus warranting the imposition of Rule 11 sanctions on appellant Simon Tache, Esq., is supported by the facts of this case and the law governing the imposition of sanctions on attorneys.
>
> (2) **Whether Appellant, L. Obioma Aham's entry of appearance in this case constituted so abusive a behavior as to violate the provisions of 28 U.S.C. Section 1927, and thus attracting the sanctions imposed by the district court.** [See Civil Information Sheet attached herein as Appendix "C"].

Petitioner promptly sent copies of the Civil Information Sheet as required by the local rules to all defense counsels and co-counsel appellant, Simon Tache. Petitioner also received a Civil Information Sheet from defense counsels but *never received* any Civil Information Sheet from Mr. Tache. Petitioner thus assumed that the only docketing sheet being filed on behalf of all three parties was the one being filed by him since there was no Civil Information Sheet from co-counsel, Mr. Tache. The notice of appeal finally arrived, and it appeared in the following form:

> Notice is hereby given that Plaintiff CTC Imports and Exports, by and *through its undersigned counsel, L. Obioma Aham, Esq.;* and Simon Tache, Esq., in his own right, hereby appeal to the United States Court of Appeals for the Third Circuit *the Order by this Court of October 22, 1990, denying the motions of Simon Tache, Esq., and L. Obioma*

Aham, Esq., for reconsideration of the Court's order imposing sanctions.

(Notice of Appeal attached as Appendix "D").

Petitioner promptly called Mr. Tache and asked why he had designated only this Petitioner as Plaintiff's counsel and why he failed to include the words "in his own right" as to Petitioner contrary to the specific instructions he had given to Mr. Tache personally, and his secretary Ms. Debbie Erardi on several occasions. At best, this petitioner told Mr. Tache the notice was somewhat ambiguous and the intentions of the parties as was clearly stated to him could be easily misunderstood. Mr. Tache replied "if they don't know what we are appealing from, then something is wrong". Petitioner, nevertheless pressed forward with the appeal given that the time to submit an amended notice had expired.

Despite the arguably ambiguous form in which the notice of appeal was given as to this Petitioner individually, it was apparent that the second issue raised and the designation of Petitioner as "Appellant" on the civil information sheet demonstrated clearly, very early in the appeals process, that Petitioner evinced an intention to appeal the sanctions against him. Indeed, an objective intention to seek review is really what the inquiry of a notice of appeal or a functional equivalency thereof is designed to achieve. It is not just an abstract term.

Further, Petitioner designated himself as "Appellant" in his brief filed on January 22, 1991, well before the office of the clerk for the Third Circuit advised in a letter of January 24, 1991, of the discrepancy in the Notice of Appeal. [*See* Letter of Mr. Bradford Baldus dated January 24, 1991, attached as Appendix "E"]. The letter suggested that since the Notice of Appeal did not designate this Petitioner in his individual capacity, the brief will not be docketed as to him personally but only as to CTC. Upon receipt of this letter, Petitioner called the Clerk's office and reached Mr. Bradford Baldus, the legal coordinator for the

Third Circuit in this case who had written the letter. Petitioner asked him how he could rectify this problem. Mr. Baldus suggested that a letter should be forwarded to the merits panel clarifying the intentions of this Petitioner to seek review in his own right. This Petitioner promptly called Mr. Tache who also spoke with Mr. Bradford Baldus. Petitioner urged Mr. Tache to write such a letter since he was responsible for the language of the Notice of Appeal in contention, explaining that it was the obvious intentions of this Petitioner to seek review. On February 7, 1992, Mr. Tache wrote the letter indicating that although the Notice of Appeal omitted specifying that Petitioner sought review "*in his own right,*" such was the actual intention of the parties. [See letter of Simon Tache, Esq. to Mr. Bradford Baldus attached as Appendix "F"]. The letter pointed out that the order appealed from was a *denial* of the motion for reconsideration filed by this Petitioner in his own right and Mr. Tache as well. CTC never filed a motion for reconsideration so the intention to appeal that order could only be ascribed to Mr. Tache and this Petitioner.

Subsequent to the filing of the briefs in the above cause, an oral argument date was given for May 6, 1991. Petitioner as well as co-counsel appeared before the panel. Co-counsel assiduously avoided any display of a brief he had apparently but surreptitiously filed in this cause without serving the same on this Petitioner.

The Court proceeded to hear the merits of the sanctions in its entirety without any limitation on this Petitioner to address only the issues pertaining to CTC. Because there was no prior determination by the Court below before oral argument as to Petitioner's right to argue as "Appellant", Petitioner assumed that the letter explaining that it was his intention to appeal in his own right had been well received. The argument centered not on CTC's role but rather on the attorneys' role. All the parties including the Respondents so argued.

On December 19, 1991, the Court below handed down its opinion. Apart from the language that it precluded itself from consideration of Petitioner's appeal because he did not file a functional equivalent of a notice of appeal, it proceeded to find "facts" which were to reveal precisely why Petitioner's notice of appeal, if so construed, was defective. The court below stated:

> The most damaging facts are attributable to CTC and perhaps Aham, but not to Tache. At the time of filing Tache was not in a position to know or obtain vital facts. Tache had no reason to suspect CTC's documents were forged. He had never worked for CTC before this matter. He did not know about the fraudulent M/V BARBRO transaction. The ICC investigator did not contact him nor had he any reason to know of the maritime inquiry unless CTC informed him. It did not. Thus, the District Court erred as a matter of law when it imputed knowledge of the information Tache could not have reasonably obtained and liability for not acting on this knowledge. [Appendix "A" at 13]

All of the foregoing information was manifestly false. There was *no* information available to this Petitioner that Mr. Tache was not aware of. Mr. Tache himself prepared Plaintiff for deposition where all the facts were aired. Mr. Tache was also on hand during the actual deposition and expressed not one iota of surprise about these facts when the defense counsel questioned Plaintiff about them. This was obviously an intentional misrepresentation deliberately made to mislead the Court of Appeals. It thus suggests the motive why Mr. Tache wanted Petitioner's notice of appeal defective. For it was clear to Mr. Tache that if the Court of Appeals had acted in time to prevent this Petitioner's appeal from being docketed, he would be the only one left to tell his

story. This was precisely why he failed to serve Petitioner with a copy of his brief. He knew, of course, that Petitioner was the only person who could refute this information promptly.

The Petitioner received a copy of the opinion below on December 24, 1991, and had until January 2, 1992 to file a Petition for Rehearing. Because Petitioner was deeply disturbed by such incredibly false statements and the findings of fact by the Court of Appeals for the Third Circuit, it occurred to him that another brief other than the one he submitted on behalf of all three parties, might have been filed, and obviously by Mr. Tache. On January 25, 1992, Petitioner called the clerk's office in Philadelphia. It confirmed that Mr. Tache had indeed filed a brief, the contents of which Petitioner has still been unable to ascertain. To make matters worse, Mr. Tache certified on his honor that he had sent this Petitioner a copy, which again was false.[5]

Despite Petitioner's co-counsel's intent to defeat Petitioner's basis of jurisdiction in the Court of Appeals, it is submitted that the Notice of Appeal as given, fulfilled the two functions of notifying the Court and the Appellees. Taken together with all prior and subsequent documents filed in this cause: the Motion for Reconsideration; reference in the Notice of Appeal to the *Order of October 22 denying Petitioner's Motion for Reconsideration; the naming of Petitioner in the latter part of the notice which would have been redundant when applied only to Mr. Tache; the description of the Petitioner as "Appellant" in the Civil Information Sheet and in his brief; the issues raised before*

5On the day that Mr. Tache's brief was supposed to have been sent to this Petitioner (January 22, 1991), Petitioner was still in Mr. Tache's office. Petitioner did not leave Philadelphia until January 25, 1991. No brief was received in Houston, either before or after this date. All other briefs from the opposing parties were received.

the Third Circuit; the contents of the briefs and subsequent communications filed before the Court of Appeals; the letter of Mr. Tache to Mr. Baldus; the oral argument by Petitioner before the Third Circuit which discussed and answered all questions regarding the merits of the sanctions imposed on him without any restriction or any specific order from the Court below to address only the issues concerning CTC; the argument by defense counsel which indicated that they knew the Petitioner intended to appeal and expressed no prejudice; and finally, the exposure of this Petitioner to the full amount of the sanctions if he did not appeal. All these were all sufficient to indicate this Petitioner's intention to seek review. In the alternative, if this Honorable Court should find that the Petitioner's intent to appeal was not manifest, the question before this Honorable Court thus is whether Rule 2 of F.R.A.P. as interpreted by this Court under *Torres v. Oakland* and its progeny, admits a jurisdictional basis in the Court of Appeals for fraudulent denial of due process and fair notice, because Petitioner's co-counsel, Simon Tache, deliberately, knowingly and willfully gave a defective notice and also deliberately and purposefully concealed his brief and its contents from this Petitioner.[6]

REASONS FOR GRANTING THE WRIT

I. THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT

A. Certiorari should be granted because the court below narrowly and restrictively construed the decision in *Torres v. Oakland Scavengers, Co.*, regarding the "functional

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6Contemporaneous with the application for this Writ, Petitioner is making a motion to vacate judgment in this cause for "fraud upon the Court of Appeals."

equivalence" of a Notice of Appeal as it pertains to this petitioner's intention to seek review of the order denying his Motion for Reconsideration.

The purpose of a Notice of Appeal as the name obviously implies, is none other than to notify the Court of Appeals and the opposing parties that an Appeal is being taken. *Torres v. Oakland Scavenger, Co.*, 487 U.S. 312, 317, 108 S.Ct. 2405, 2409 (1988); *Cobb v. Lewis*, 488 F.2d 41, 45 (5th Cir. 1974) (*cited with approval in Advisory Committee Note to Rule 3.*) This in turn ensures that the appellees are not prejudiced in any way by an appeal and the appellants are identifiable for the purpose of assuming whatever obligation flows from the appeal. *Id.* While this Court has ruled in *Torres* that complying with the specificity requirement of Rule 3(c) is jurisdictional and unwaivable even for good cause, it nevertheless recognized as it had done earlier in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed 222 (1962), that the "requirement of the rules of procedure should be liberally construed and that mere technicalities should not stand in the way of consideration of a case on its merits." *Torres, supra*, 108 S.Ct. at 2408; *Foman*, 371 U.S. at 181-182, 83 S.Ct. 229-230; *Advisory Committee Note to Rule 3(c) as Amended in 1979.* Thus, as this Court stated in *Torres*

> [I]f a litigant files papers in a fashion that is *technically at variance with the letter of a procedural rule,* a court, may nonetheless find that the litigant's action is the functional equivalent of what the rule requires.

Id. 108 S.Ct. at 2409. (Emphasis added)

What constitutes a "functional equivalent" of a notice of Appeal under *Torres* was not defined by this Court. However, Courts of Appeals have sought to fill this void by designating what conforms to the rule, albeit sometimes, mechanistically. Thus in *Dura Systems, Inc. v. Rothbury*

Investments Ltd., 886 F.2d 551 (3d Cir. 1989) a case similar to the one at bar, the Third Circuit following the liberal construction mandated even by *Torres*, found that although the Notice of Appeal named only Dura Systems, a consent order which specifically named the client Dura Systems and the law firm and various individuals as parties securing the district court's judgment pending appeal, constitutes a functional equivalence to Notice of Appeal. *See Id.* 886 F.2d at 555. The Court in *Dura Systems*, echoed with approval the Advisory Committee's admonishment that "so long as the function of notice is met by filing *a paper indicating an intention to appeal*, the substance of the rule has been complied with." *Id.*; *Advisory Committee Notes to 1979 amendment to Fed.R.App.P. 3(c).* (Emphasis added). The Third Circuit extended this rationale in *Masquerade Novelty v. Unique Industries*, 912 F.2d 663, 665-666 (3d Cir. 1990), as not necessarily implying a particular form of "documents filed within the time period for appeal, *i.e.*, whether the document is a consent order or attorney appearance form, but on the *content* of the documents, *i.e.*, whether the information required by rule 3(c)."[7]

As the Fifth Circuit made clear in *Cobb v. Lewis, Supra*, the intent to appeal should be the controlling inquiry and should govern the determination whether a functional equivalence existed. Thus "any statement" made to the Court of Appeals or the District Court "which evinces an intention to appeal should satisfy the requirement of notice." *Id.* 488 F.2d 41,45 (5th Cir. 1974). In the above regard, if a litigant can help clarify in good faith any ambiguity in order to get to the merits, it is hard to see what difficulty such assistance imposes on the system other than to aid the

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7In so doing, the Third Circuit overruled an earlier decision in *Cruz v. Melendez*, 902 F.2d 232 (3d Cir. 1990) stating that an attorney appearance form could never serve as a functional equivalence of a notice of appeal. *See, Id.*

court to accomplish the goals of substantive justice urged by *Foman* and Rule 2. *See Foman*, 83 S.Ct. at 230; Advisory Committee Notes to Rule 2.

In the instant case, the identities of the Petitioner and other appellants was never in question. The defense counsel expressed no prejudice by the notice, for they expected that Petitioner would appeal and prepared accordingly. Despite this obvious situation, the Court below refused to accept jurisdiction over petitioner. The Third Circuit's authority for this inflexibility was *Torres*. To the extent that *Torres* could be read as jurisdictional bar for failure of an appellant's name to appear on the Notice of Appeal, this case is distinguishable from *Torres*.

In *Torres*, petitioner, the only person of 16 plaintiffs who was inadvertently left out on the Notice of Appeal filed by his attorney, appealed to this Honorable Court. The Court found that Petitioner in that case was not mentioned either *directly* or by *implication* in the notice of appeal filed. The only information which the petitioner therein relied on as functional equivalent was the use of the word "et al." This Honorable Court rejected that as insufficient notice to the court and the respondents. By contrast, this Petitioner's name appeared twice in the Notice of Appeal. The notice mentioned the order he was appealing from, *i.e.*, a denial of a Motion for Reconsideration filed in his individual capacity. The second mention of Petitioner's name would have been redundant when applied to Mr. Tache. So at least indirectly Petitioner fulfilled the requirement of identifiability and the Court below should have so found.

B. Certiorari should be granted to resolve an irreconcilable contradiction and conflict engendered by this decision and which exists amongst various federal courts of appeals involving an important, recurring issue of constitutional law.

The Court of Appeals' liberal interpretation and conclusion as to plaintiff CTC greatly contradicts the restrictive and narrow result it reached in regard to this Petitioner's intention to appeal. Having first noted that CTC "cannot appeal from an order denying a motion it never filed," (Appx. A at 7), the Court below nevertheless stretched in the spirit of "liberal construction" urged by *Torres* to find that CTC's notice was good even though it failed "to meet the letter at Rule 3(c)" (Decision below, Appx. "A" at 7-8). In so doing, the Court below failed to recognize that the petitioner's appeal from that order was well within the contemplation of all parties. A further contradiction of the decision below could be seen when the Court concluded that "it is clear that CTC *intended* and *tried* to appeal the April 27, 1990 imposing sanctions." *Id.* The issues raised on the appeal's brief and the civil information sheet and the argument before the court below belies such an assertion. Despite the manner in which the notice in issue here was given, it was clear first that this Petitioner intended first to appeal the sanctions against him, and by implications the basis of the overall decision. The argument before the Court below was mostly on the merits of such sanctions on the attorneys. A contrary interpretation would find no support in the record. Thus, the court below's attempt to mischaracterize petitioner's attempt and intentions in this regard or deny them, would probably speak to why he was afforded such restrictive interpretation in the first place.

Taken together, therefore, while the Notice of Appeal as to petitioner does not employ the magic words "in his own right", the intent to seek review was nevertheless manifest, despite co-counsel's machination in this regard. The court of Appeals below failed to engage in any inquiry relative to petitioner's intention to seek review. The decision below was wholly conclusory. This narrow and restrictive interpretation of a functional equivalence and the contrary

conclusion reached in this case of CTC neither comports with the liberal construction mandated by *Foman* and even by *Torres*, nor by that reached by the Third Circuit itself in its prior decisions in *Dura Systems, Supra,* or *Masquerade Novelty v. Unique Industries*. 912 F.2d 663 (3d Cir. 1990). This Honorable Court should therefore grant certiorari to review and resolve the irreconcilable contradictions and conflict engendered by the decision below, and which exists amongst various federal courts of appeals involving an important, recurring issue of constitutional law.

II. CERTIORARI SHOULD ISSUE BECAUSE *TORRES* WAS WRONGLY DECIDED.

A. To the extent that *Torres* unwaivability construction of Rule 3(c) of F.R.A.P. purports to achieve the same liberal objectives prescribed by Foman and the Federal Rules of Civil Procedure, Rule 1 and FRAP, Rule 2, *Torres* was wrongly decided.

Even assuming *arguendo* that a functional equivalence was not filed by this petitioner in this case, to the extent that *Torres* unwaivability rules purports to achieve the same objectives of liberal interpretation prescribed by *Foman* and Federal Rule of Civil Proc. Rule 1 and Rule 2 of **FRAP**, *Torres*, it is respectfully submitted, was wrongly decided. In this regard, the attempt by *Torres*' court to distinguish and limit the broad reaches of *Foman* and the above mentioned Federal Rules, it is again submitted, was ineffective. Because *Torres* neither expressly nor implicitly overruled *Foman*, the latter is still good law. For as Justices Brennan and Scalia noted in their dissenting and concurring opinion in *Torres* respectively, if the purpose of *Torres* is to achieve the liberal interpretation mandated by the Federal Rules, that

goal was completely missed and petitioner in *Torres* and others similarly situated, such as this petitioner, should have been admitted within the ambit of that decision. *Id.* 108 S.Ct. at 2409, (Scalia J., concurring; at 2410-2413, Brennan J., dissenting).

Contrary to the assertion of the Court below, the draconian unwaivability result announced in this case pursuant to *Torres* finds no support whatever in either the Rules themselves or in *Foman* or even in the Advisory Committee's Note to Rule 3(c). For whatever support that Courts applying *Torres* may claim is entirely belied by the urgent lamentation of such rigid construction by the *Foman* Court when it stated:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.

Foman, Supra 83 S.Ct. at 630.

The above language speaks to the broader, liberal interpretation to be afforded analysis of a seemingly defective notice of appeal. "It is too late in the day and entirely contrary to the spirit of the Federal Rule of Civil Procedure," the *Foman* court stressed, " for decisions on the merits to be avoided on the basis of such mere technicalities." *Id.* "Federal Rules", the court continued, "*rejects the approach* that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and *accept the principle* that the purpose of pleading is to *facilitate a proper decision on the merits. Id.* quoting *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2L.Ed.2d 80.) (Emphasis added).

The Advisory Committee itself stated:

> Because of the fact that the timely filing of the notice of appeal has been characterized as jurisdictional (Citing, *e.g.*, *Brainerd v. Beal*, 498 F.2d 901, in which the filing of a notice

> of appeal one day late was fatal), it is important that the right to appeal not be lost by mistake of mere form.

See, Advisory Committee's Note to Rule 3(c) as Amended in 1979.

What constituted "mere form" was not defined, but the Committee suggested that a number of decided cases held that "so long as the function of notice is met by the filing of *a paper* indicating to appeal, the substance of the rule has been complied with." *Id.* (Citing with approval *Cobb v. Lewis*, 488 F.2d 41; (5th Cir. 1974); *Holley v. Capps*, 468 F.2d 1366 (5th Cir. 1972)).

It can be seen that the Advisory Committee's choice of the *Brainerd* case, *Supra*, suggests that a mistake of form goes beyond ambiguous notices. It should include notices filed out of time when there is no prejudice to appellees. Such filing of a notice of appeal one day late could reasonably be construed to constitute "mere form" under the committee's statement. The Fifth Circuit in *Cobb v. Lewis, supra*, amplified this reasoning when it concluded that so long as the Court and the opposition are given notice by *any statement* which evinces a party's intent to appeal, substantial compliance with the rules is satisfied. *Id.* The rules were not adopted to set traps and pitfalls by way of technicalities for unwary litigants. *Id.*

In the instant case, all the parties, sanctioned including Petitioner, were identifiable. The sanctions ran jointly and severally with no possibility that any of the Appellants could have avoided liability in a manner that would prejudice the Respondents, save at his own peril. Respondents had lived with their case for two years. A contention that they do not now have notice is mere legal fiction and an ultimate window dressing. The dismissal of Petitioner's case for lack of jurisdiction merely hands Respondents who had already admitted the futility of their

actions against Plaintiff's counsel,[8] a default judgment; it rewards them with an unmerited windfall for flouting Rules 11 and §1927 with impunity. They are now, it should be stressed, to benefit from a case they never had and never should have brought in the first place, and for which they should have been sanctioned for egregious abuse of the process.

B. To the extent that *Torres* compels a harsh and unjust result at odds with the traditional notion of fairness and substantial justice under jurisdictional due process inquiry codified in Rule 2 of F.R.A.P., it was wrongly decided.

Implicit in every jurisdictional inquiry whether at an inception of a suit at the District Court or the appellate level is the traditional notion of "fairness" and "substantial justice". While these doctrines have mostly been applied in cases hailing foreign defendants with tenuous connections into a forum *(See e.g., International Shoes v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny), there is little doubt that Courts of Appeals have in the past engaged in such inquiries when substantial justice warrant acquiring appellate jurisdiction over an appellant who has filed a defective notice of appeal where intent to appeal was apparent and manifest injustice would result. (*See* Rule 2 of Fed.R.App.P. and Advisory Committee Notes thereto); (*See, e.g., Crump v. Hill*, 104 F.2d 36 (5th Cir. 1939), and *Cobb v. Lewis, Supra*).

Courts of Appeals are specifically empowered by Rule 2 of F.R.A.P. to make such substantial justice inquiries and suspend *any of these rules* in the interest of justice. *Id. See, also Torres*, 83 S.Ct. 2412 (Brennan, J., dissenting).

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[8] *See* Note 3 *supra*.

Indeed, such fundamental, and doctrinal concept of fairness and substantial justice underlying the basis of acquisition of jurisdiction over a person or an entity with minimum contact with a forum at inception of a case at first instance, cannot logically or plausibly be denied at the appellate level. For ultimately, these courts must comport their jurisdictional inquiries to achieving the goals of the Federal Rules of *just, speedy* and *inexpensive* resolution of every case as set out in Rule 1 of F.R.C.P. (emphasis added). The prohibition of Rule 26(b) dealing with the enlargement of time to give notice, it is respectfully submitted, does not preclude the application of Rule 2 in the instant case; for petitioner does not seek to enlarge time for notice, but only that this Honorable Court consider the manifest injustice that would result if Rule 2 is not given its intended effect.

Rather than the harsh results which the *Torres* Court admits in its ruling, a better view, it is submitted, is the analogy of the due process fairness and substantial justice requirement which must be complied with in commencing a case at the district court level, or the concept of voluntary submission to jurisdiction by a defendant or even to a lesser extent, the doctrine of ancillary or pendant jurisdiction authorizing courts to acquire jurisdiction in cases when it would lead to just and speedy disposition of cases.

The above rationale is not alien and ought not to be far fetched in regard to the appellate jurisdiction. However, it is respectfully submitted that since some due process notion of traditional fair play and substantial justice is implicated at the appellate level if not specifically authorized by Rule 2, any decision that denies such an inquiry offends, the whole foundation of due process clause of the Fifth Amendment to the United States Constitution. For at the end of the day, while it is important and preferable to have both a smooth functioning procedural safeguards in any legal system as well as one that adjudicates substantial rights fairly, a worse outcome, however, would be if an

overwhelming and mechanistic preoccupation with procedure tramples substantive rights. In the instant case, for example, this petitioner would be obliged to commence yet another litigation in order to obtain an obvious justice. It is hard to imagine how such a denouement could lead to the achievement of the precious goals of the Federal Rules of *just, speedy* and *inexpensive* resolution of this litigation; or how, for that matter, our system of jurisprudence is better served by allowing unwary litigants to be ambushed; or even by the publications of opinions based on half truths, simply because a notice of appeals was ambiguous. Petitioner thus prays that a writ issue on the grounds that Rule 26(b) of F.R.A.P. does not preclude the application of Rule 2 of F.R.A.P. to the peculiar facts of this case. In this regard Petitioner respectfully urges that to the extent that *Torres'* "liberal" interpretation does not include this inbuilt traditional notion of "fair play" and "substantial justice", it was wrongly decided.

III. CERTIORARI SHOULD BE GRANTED FOR PETITIONER'S CO-COUNSEL'S PERPETRATION OF FRAUD ON THE COURT OF APPEALS

Certiorari should be granted to rectify the manifest injustice that is certain to be visited upon this Petitioner, for the important and cogent reason that due process of law was denied this Petitioner when his co-counsel deliberately and intentionally sought to defeat the jurisdiction in the Court of Appeals by filing the defective notice of appeal contrary to the agreement of the parties, and by deliberately concealing his brief and the contents thereof from this Petitioner.

Petitioner did not become aware until January 24,

1992 (when he called the office of the Clerk for the Third Circuit), of the fact that another brief had been surreptitiously filed by his co-counsel behind his back, the contents of which he has yet to ascertain. By this time, Petitioner's hearing and Suggestion En Banc had been denied.[9] Because Petitioner was unsure of the source of such information, all he could say on his Petition for Rehearing was that he was unsure whether the notice of appeal was given by *design* or *default*. Petitioner, however, was deeply disturbed by language of the Court of Appeals quoted in Statement of Facts herein, *Supra,*[10] which of course was completely false and manifestly untrue, and constituted a deliberate attempt by his co-counsel to mislead the Court of Appeals regarding his actual knowledge about the case.

The power to vacate a judgment that has been obtained by fraud upon the Court, this Honorable Court has stated, is inherent in courts. *Universal Oil Products co. v. Root Ref. Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946). *Hazel-Atlas Glass Company v. Hartford Empire Company*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). "The Spirit" of fraud on the court rule[11] is applicable whenever the integrity of the judicial process or functioning has been undercut -- certainly in any instance, of misconduct by a party." *Greater Boston Television Corp. v. F.C.C.*, 462 F.2d 268, 278, 149 U.S. App. D.C. 322 (D.C. Cir. 1971). Further, it has been held that an appellate court has the inherent power to inquire into the integrity of its own judgments and to set them aside when fraud or corruption of

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9 Appx. "B".

10 This writ at page 7-8.

11 *See*, Final Saving Clause of Rule 60(b) of Federal Rule of Civil Procedure.

its officers has been shown. *Hazel-Atlas, Supra*, 64 S.Ct. at 1001, 322 U.S. at 245.

In the leading case of *Hazel-Atlas Glass Co. v. Hartford Empire Company, Supra*, the Third Circuit had affirmed a judgment in favor of Hartford and against Hazel for patent infringement. More than ten years later, Hazel filed a petition in the Third Circuit asking that judgment be set aside. It established that an attorney for Hartford had written an article extolling the patent as a remarkable advance and had arranged to have the article printed in a trade journal under the name of an ostensibly disinterested expert. Both the Patent Office, in granting the patent, and the Third Circuit in upholding its validity, had relied in part on the article. This Honorable Court (per Black, J.) held that the judgment must be vacated. It stated:

> Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not a case of a judgment obtained with the aid of a witness, who on the basis of after discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.

Id. 322 U.S. at 245, 64 S.Ct. 1001

Since the fraud in that case as in the instant case had been perpetrated on the Third Circuit, that Court was held to be the appropriate court to remedy the fraud. *Id.* 64 S.Ct. at 1002-1003, 322 U.S. at 247-250. It was directed to vacate its original judgment in favor of Hartford and deny all relief to Hartford. This Court went on to hold that the power to vacate for fraud exists in every court. *Id.* 64 S.Ct.

at 1002-03, 322 U.S. at 247-50.[12]

Further, although a party may bring the matter to the attention of the Court, this is not essential; the Court may proceed on its own motion. *Universal Oil Prods. Co. v. Root Ref. Co.*, 66 S.Ct. 1176, 328 U.S. 575, 90 L.Ed. 1447 (1946).[13] The fact that there are no adversary parties on the claim of fraud on the court does not deprive the court of jurisdiction. Since the original argument, by hypothesis must have been in a "case or controversy", the Court continues to have ancillary jurisdiction to determine whether it has been the victim of a fraud. *Id.* There is no time limit on setting aside a judgment on this ground, nor can laches bar consideration of the matter. *Id.*[14] And it does not matter whether a party bringing the fraud to the court's attention has clean hands. *Martina Theatre Corp. v. Schine Chain Theatres, Inc.*, 278 F.2d 798, 801 (2d Cir. 1960). Moreover, if it is found that there was a fraud on the court, the judgment should be vacated and the guilty party denied all relief. *Id.*, *Hazel-Atlas*, 64 S.Ct. 1003-04, 322 U.S. at 250-51. The entire cost of the proceedings including attorneys' fees, may be assessed against that party. *Universal Oil Prods., Supra*, 66 S.Ct. at 1179, 328 U.S. at 580.

In the instant case, not only was deliberate concealment of co-counsel's brief an affront to the notice requirement and a denial of due process, it was trial by ambush! By deliberately making Petitioner's notice of appeal defective and thus removing the Petitioner from the process,

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12*See*, Wright and Miller, Federal Practice and Procedure §2870 at 247-257.

13Wright and Miller, *Supra* §2870, p. 250.

14Citing *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699 (2d. Cir. 1972) Cert. Denied, 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed. 2d 139.

Mr. Tache knew, of course, that he could proceed to tell the Court of Appeals whatever he wanted even if as in this case they were lies. Had the Court of Appeals not mentioned these facts in its opinion, this Petitioner might not have been able to discover the truth about the secret brief and would have had no recourse at all. Petitioner thus prays that certiorari issue to set aside this fraudulently obtained judgment for denial of the process that was due.

CONCLUSION

For all the foregoing reasons, Petitioner L. Obioma Aham-Neze respectfully prays that a Writ of Certiorari to the Third Circuit Court of Appeals issue.

Respectfully submitted,

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L. Obioma Aham-Neze, Esq.

APPENDIX A

Filed December 19, 1991
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1886

CTC IMPORTS AND EXPORTS
V.
NIGERIAN PETROLEUM CORPORATION,
GULF SHIPPING AGENCY (NIGERIA, LTD.),
UNIVERSE MARITIME PIREAUS,
MARZELLI, CASA,
MV "VYTINA",
NICHOLOS, CAPTAIN STRATIS,
RICE UNRUH,
RUSSEL, SHELTON, Individually and as
Representative of British Petroleum.
BRITISH PETROLEUM, SOHIO SUPPLY COMPANY
ADDAX OVERSEAS S.A. OF PANAMA
V.
INDAKWA, JOHN, SCHIEFEN, JACK, MATTHEW
A., THOMAS P., OLICKAN, JOSEPH, MATHAI,
THOMAS, OMUHAMBE, SHADRAH,
INTERNATIONAL MARITIME TRANSPORT, INC.
BEHRENS, WOLFGANG, LUDWIG, PETER, DOE,
JOHN ROE, JOHN, XYZ CORPORATION

CTC IMPORTS AND EXPORTS,
SIMON W. TACHE, ESQUIRE,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil Action No. 89-01815)

Argued May 6, 1991

Before: MANSMANN and NYGAARD,
Circuit Judges and
RONEY, *Circuit Judge**

Filed: December 19, 1991

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* Honorable Paul H. Roney, United States Senior Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

CTC Imports and Exports sued to arrest the vessel M/V Vytina. The district court dismissed the complaint and upon motion imposed sanctions against CTC and its attorneys, Obioma Aham and Simon Tache, pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. They appeal from an order denying motions by Tache and Aham for reconsideration of the sanctions. We conclude that Aham is not an appellant. Thus we will dismiss his appeal. We hold that the district court properly sanctioned CTC. Because we further hold that the district court improperly dismissed Tache's motion for reconsideration, we will reverse the order denying Tache's motion and remand the matter to the district court.

I.

CTC through its attorneys, Tache and Aham, falsely arrested a Nigerian oil shipment aboard the Vytina. on March 10, 1989, at about 11:00 p.m., Aham, an attorney for CTC, contacted Tache and requested Tache to act as local counsel for CTC in arresting the Vytina. Thereafter events moved rapidly. On March 11, a day before the Vytina was scheduled to arrive in Philadelphia, Tache filed a complaint against defendants/appellees. The complaint against defendants/appellees. The complaint alleged that CTC was the rightful owner of cargo aboard the Vytina at Port of Bonny, Nigeria. It sought arrest of the vessel when it docked at Marcus Hook, Pennsylvania. On March 12, the district court issued an emergency order authorizing the arrest. On March 13, the Vytina arrived at Marcus Hook and the arrest warrant was executed.

On March 15, the district court vacated the arrest warrant pursuant to the parties' stipulation and the litigation proceeded. In the next two days, Captain Nikolaos Stratis, the master of the Vytina, and John Indakwa, President of CTC, were deposed. Stratis' testimony showed that CTC's claim of legal title was based on forged documents. On March 21, the district court held a hearing to resolve discovery disputes and ordered CTC to produce shipping documents to substantiate its legal title to the cargo. On March 26, defendants moved for an expedited hearing for summary judgment and the court heard oral argument on March 31. Because CTC failed to file a verification with its complaint, the court dismissed the complaint with leave to file a proper verification.

Defendants filed a joint motion for sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. On April 27, 1990, the district court sanctioned Tache for conducting an inadequate pre-filing inquiry and CTC for filing a frivolous complaint pursuant to Rule 11. The court also sanctioned Aham pursuant to 28 U.S.C. § 1927 for entering an appearance after the arrest warrant had been vacated and for joining in all filed papers. It imposed joint and several liability for sanctions among these three parties and awarded the defendants attorneys' fees. On May 2, 1990, the court entered judgment.

On May 9, 1990, Tache on his own behalf filed a motion for reconsideration of the April 27 order. On July 2, 1990, Aham on his own behalf filed a similar motion. On October 22, 1990, the court denied Tache's and Aham's motions without opinion. On November 21, 1990, Tache and CTC filed a timely notice of appeal.

II.

Before discussing the merits of the sanctions, we must decide the threshold issue of whether we have appellate jurisdiction for all parties: The notice of appeal reads:

Notice is hereby given that Plaintiff CTC

> IMPORTS and EXPORTS, by and through its undersigned counsel, L. Obioma Aham, Esquire; and Simon W. Tache, Esquire, in his own right, hereby appeal to the United States Court of Appeals for the Third Circuit from the order by this Court of October 22, 1990, denying the motions of Simon Tache, Esquire and L. Obioma Aham, Esquire, for reconsideration of the court's Order Imposing Sanctions.

As to Tache, this notice satisfies Federal Rule of Appellate Procedure 3(c)(Rule 3(c)).[1] As to CTC and Aham, however, the notice presents problems.

First, Aham filed the notice of appeal not on his behalf, but on behalf of CTC. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S.Ct. 2405, 2407 (1988), the Supreme Court held that if a party fails to satisfy the requirements of Rule 3(c), then the appellate court lacks jurisdiction over that party. Rule 3(c) requires the notice to "specify the party or parties taking the appeal." 487 U.S. at 314, 108 S.Ct. at 2407. Since the timely filing of a notice of appeal is mandatory and jurisdictional, the notice as to Aham's appeal is fatal unless he filed a functional equivalent of a timely notice. 487 U.S. at 317, 108 S.Ct. at 2409.

A functional equivalent to a notice of appeal must identify Aham as the party taking the appeal. *See Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 665 (3d Cir. 1990) (several documents when considered along with original notice of appeal serve as functional equivalent); *Dura Systems, Inc. v. Rothbury Inv., Ltd.*, 886

1When a Rule 59(e) motion is filed, it tolls the time for filing a notice of appeal under Federal Rule of Appellate Procedure 4(a) for all parties. Fed.R.App.P. 4(a)(4). *See Rosen v. Rucker*, 905 F.2d 702, 707 (3d Cir. 1990). Thus all parties satisfied Rule 4(a)'s jurisdictional time requirement.

F.2d 551 (ed Cir. 1989) (consent order naming parties taking appeal serves as functional equivalent), *cert. denied* 493 U.S. 1046 (1990). Nothing in the record serves as a functional equivalent. The only notice of appeal he filed was on behalf of CTC, which is not a notice on his behalf.[2] Aham failed to comply with the jurisdictional prerequisites.

Second, CTC purports to appeal from the order denying Tache's Federal rule of Civil Procedure 59(e) motion for reconsideration.[3] It appealed from the wrong order under Rule 3(c). Rule 3(c) provides: "The notice of appeal ... shall designate the judgment, order or part thereof appealed from." When a Rule 59(e) motion is denied, "the judgment of the initial order becomes final and subject to appeal." *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348(3d Cir. 1986). CTC cannot appeal from an order denying a motion it never filed. It should have appealed from the initial April 27 order imposing sanctions, which became final upon the denial of the Rule 59(e) motion. Thus CTC fails to meet the letter of Rule 3(c).

In *Torres*, the Court said "that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." 487 U.S. at 316, 108 S.Ct. at 2408. Thus if a party files a notice of appeal that fails to meet the letter of the rule, "a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule

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2Since the district court imposed joint and several liability, had Tache filed his motion on behalf of all the sanctioned parties we would face the issue of whether Tache's notice is a functional equivalent to a proper notice. But this is not the case, Tache moved and requested relief on his behalf only.

3We will further discuss the nature of the motion later in this opinion.

requires." 487 U.S. at 317, 108 S.Ct. at 2408-09.

We conclude that the notice of appeal is a functional equivalent to giving notice that CTC is appealing the April 27 order. Our jurisprudence require that we liberally construe notices of appeal. *See Foman v. Davis*, 371 U.S. 178, 181-82, 83 S.Ct. 227, 229-30 (1962). It is clear that CTC intended and tried to appeal the April 27 order. there is no prejudice because all parties assumed that CTC was appealing the sanctions order and argued so. We will treat CTC's notice of appeal as "an effective, although inept, attempt to appeal from the [April 27] judgment" imposing sanctions. 371 U.S. at 181, 83 S.Ct. at 229. *See Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1254 (3d Cir. 1977)("if from the notice of appeal itself and the subsequent proceedings on appeal it appears that the appeal was intended to have been taken from an unspecified judgment order or part thereof, the notice may be construed as bringing up the unspecified order for review")(citing *Foman*, 371 U.S. 178, 83 S.Ct. 227). Thus, Tache and CTC are the only appellants properly before this court.

III.

A.

Tache appeals from the order denying his motion for reconsideration. He argues that the district court improperly denied his motion because he satisfied the requisite duties under Federal Rule of Civil Procedure 11 (Rule 11). We will treat this as a motion under Federal Rule of Civil Procedure 59(e), even though Tache identifies rule 60(b) in his memorandum to support the motion. *Rankin v. Heckler*, 761 F.2d 936, 942 (3d Cir. 1985) ("Regardless how it is styled, a motion filed within ten days of entry of judgment questioning the correctness of a judgment may be treated as a motion to alter or amend the judgment under Rule 59(e).") Though plaintiff designated his motion as a rule 60(b) motion, we note that the parties briefed the merits. And as in *Rankin* because plaintiff "filed his motion seven days after

entry of judgment, we treat it as a motion under Rule 59(e) challenging the entire judgment, including the [merits]." 761 F.2d at 942.

In his motion for reconsideration and memorandum to support the motion, Tache requests the district court to "reconsider and relieve me of its Order." By this Tache requests the district court to vacate its order. In his appellate brief, Tache requests us to "reverse[] and vacate[]" the district court's order. This relief is cognizable under rule 59(e). *Kelly v. Delaware River Joint Comm'n*, 187 F.2d 93, 94 (3d Cir.), *cert. denied* 342 U.S. 812 (1951). It is clear that Tache intends to challenge the entire judgment and not just the denial of the motion. Regardless of how denominated, this motion is a Rule 59(e) motion. A denial of Rule 59(e) motion to alter or amend "brings up the underlying judgment for review." *Quality Prefabrication, Inc. v. Daniel J. Keating Co.*, 675 F.2d 77, 78 (3d Cir. 1982).

Since the standard of review for a denial of Rule 59(e) motion varies with the nature of the underlying judicial decision, our standard is that which we apply to review a Rule 11 sanction. *Rauscher*, 807 F.2d at 348. To determine whether sanctions are appropriate, we must consider the district court's factual determinations, legal conclusions, and exercise of discretion in shaping its sanction. To these we apply an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.* 110 S.Ct. 2447, 2461 (1990) (citing *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66 (3d Cir. 1988) *cert. denied* 488 U.S. 848 (1988)). A district court abuses its discretion when it misinterprets Rule 11 or clearly errs in assessing the evidence. 110 S.Ct. at 2461.

B.

Rule 11 provides, in relevant parts:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the

> pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation....

An attorney's signature certifies that the attorney has satisfied three duties: (1) that he has read the documents; (2) that he has made a reasonable inquiry; and (3) that he is not acting in bad faith. Each duty is independent; the violation of one triggers Rule 11 sanctions. *See* 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1335 (1990). The district court found that Tache failed to satisfy the second duty; it found Tache's inquiry "woefully inadequate."

To determine the reasonableness of an inquiry, the district court applies an objective "reasonableness under the circumstances" standard. *Napier v. Thirty or More Unidentified Agents*, 855 F.2d 1080, 1090-91 (3d Cir. 1988). In applying this standard, the "court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." Notes of Advisory Committee on Rules, 1983 Amendment, Fed. R. Civ. P. 11, *reprinted in 97 F.R.D. 165, 199. See, Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985).

Because the standard is a fact specific one, the court must consider all the circumstances. *See Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 95 (3d cir. 1988). "Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as

to the facts underlying the pleading, motion, or other paper; ... or whether he depended on forwarding counsel or another member of the bar." Advisory Committee Note, 97 F.R.D. at 199. *See Lingle*, 847 F.2d at 95. Particularly relevant to this appeal is "whether [one] is in a position to know or acquire the relevant factual details." *Colburn v. Upper Darby Township*, 838 F.2d 663, 667 (3d Cir.), *cert. denied* 489 U.s. 1065 (1988).

C.

In imposing sanctions against Tache, the district court reasoned as follows. *First*, the name of the master and the seal of the Vytina on CTC's bill of lading are plainly different from the actual master and ship's seal. *Second*, the documents further showed that the Vytina loaded the cargo of oil on February 25 and 26 and that the bill of lading was executed by the master on February 26. Had Tache simply referred to available maritime publications he would have found that the Vytina left Nigeria on February 24 and was approximately 700 miles into the Atlantic when the bill of lading was allegedly executed. *Third*, CTC offered no documentation evincing charter of the Vytina or financing for the purchase of oil with a market value in excess of $16 million. *Fourth*, before CTC filed its complaint an investigator from London's International Chamber of Commerce contacted CTC. The investigator informed CTC that its documents were forgeries and offered to assist in an investigation. *Fifth*, this was not CTC's first experience with forged shipping documents for cargo from Nigeria. CTC had laid claim to a cargo of Nigerian crude on board the M/T Barbro as recently as February 6, 1989. The cargo was, in fact, owned by Sohio Supply Company. This clearly placed CTC on notice that it had no valid claim to the cargo on board the Vytina.

On these findings the district court rejected Tache's argument that he made a reasonable inquiry given the circumstances. It concluded, "Even the most cursory

investigation would have revealed the circumstances described above and would have put [Tache] on notice of the fraud before encumbering a vessel carrying a $16 million cargo." We disagree for three reasons.

First, the district court assumed that if knowledge of the above factors is attributable to one it is attributable to all. It considered CTC, Aham, and Tache to be on equal footing as to knowledge, access to information, and time constraints. Where, however, the court sanctions more than one party, it must make particularized findings and conclusions as to each party's liability considering his or her unique circumstances. The language of Rule 1 supports this conclusion: the district court must determine whether "to the best of the *signer's knowledge, information, and belief* formed after reasonable inquiry" the pleadings have been properly filed. Fed. R. Civ. P. 11 (emphasis added). Circumstances may differ with each signer. While circumstances of one may bear on those of another, they may not be imputed to the other unless it is reasonable to do so. Here it was not.

The most damaging factors are attributable to CTC and perhaps Aham, but not to Tache. At the time of filing Tache was not in a position to know or obtain vital facts. Tache had no reason to suspect CTC's documents were forged. He had never worked for CTC before this matter. He did not know about the fraudulent M/T Barbro transaction. The ICC investigator did not contact him nor had he reason to know of a maritime inquiry, unless CTC informed him. It did not. Thus, the district court erred as a matter of law when it imputed knowledge of information Tache could not have reasonably obtained and liability for not acting on this knowledge.

Second, the district court found "that the Vytina did not arrive at port until Monday, March 13 ... undermines counsel's argument that a proper investigation could not be conducted because time was of the essence." The court was correct in that the Vytina actually arrived on March 13.

Nonetheless Tache *at the time* was working under the assumption he had less than twenty-four hours to make the inquiry and, if proper, then to prepare the pleadings. Aham contacted Tache about acting as local counsel for CTC at about 11:00 P.M. on March 10, 1989. Aham forwarded the necessary documents to him the next morning on March 11. The Vytina was scheduled to arrive in Philadelphia on March 12. The district court found that the Vytina could discharge its cargo in a day, after which it could leave Philadelphia. Tache filed the complaint on March 11. By considering the actual time lapsed rather than the time Tache reasonably thought he had, the district court misapplied Rule 11 by using the wisdom of hindsight. *Holtzman*, 775 F.2d at 540. And it clearly erred when it implicitly found time was not of the essence. *Lingle*, 847 F.2d at 95.

Third, the Advisory Committee listed the lack of time and the need to rely on a client or forwarding counsel for information as factors in determining the propriety of Rule 11 sanctions. 97 F.R.D. at 199. Yet the district court made no findings as to these factors. These factors often function inversely: The shorter the time the more reasonable it is for an attorney to rely on the client or forwarding counsel. If an attorney is not allowed to reasonably rely on his client in circumstances where time is of the essence, then no attorney is safe in filing an emergency pleading. Rule 11 sanctions bad faith and unreasonable conduct; it does not sanction bad or undesirable circumstances. By failing to consider to what extent Tache could have relied on Aham and CTC, the district court misapplied Rule 11.

The apparent validity of the documents, the first time dealing with CTC, the lack of access to information, and the time constraint, all indicate that Tache acted reasonably under his circumstances. Indeed, exercising candor with the court, appellees' counsel conceded at oral argument that armed with the same information and facing the same circumstances he would "in all honesty probably be sitting

where he [Tache] is."

The district court imposed sanctions against Tache because he caused the "manifestly frivolous arrest of a $16 million cargo of oil." In imposing Rule 11 sanction, however, the court does not pass judgment on the merits of an action. *See Galardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987) ("Rule [11] must not be used as an automatic penalty against an attorney or a party advocating the losing side of a dispute"). Rather it requires the determination of a collateral issue: Whether the attorney has abused the judicial process. *Cooter & Gell*, 110 S.Ct. at 2456. *See Teamsters Local Union*, 841 F.2d at 68 (Rule 11 sanction is appropriate "only if the filing of the complaint constituted abusive litigation or misuse of the court's process"). In light of all the circumstances we hold Tache did not abuse the process and the district court erred by sanctioning him. *See Cooter & Gell*, 110 S. Ct. at 2461.

D.

As discussed, the most damaging of the district court's findings are attributable to CTC. This was not CTC's first involvement with forged documents. CTC knew before it filed its complaint that the validity of its documents were being questioned by London's ICC. Armed with this knowledge and experience, CTC, the district court found, acted unreasonably when it sought to arrest a $16 million cargo of oil. We find no clear error in the court's fact-finding and hold that the district court did not abuse its discretion when it sanctioned CTC.

IV.

We conclude that Aham is not an appellant; that the district court improperly dismissed Tache's motion for reconsideration; and that it did not abuse its discretion in sanctioning CTC. Accordingly, we will dismiss the appeal of Aham; we will affirm the order imposing sanctions against CTC; we will reverse the district court's order denying Tache's motion, and remand for the district court to vacate

its judgment imposing sanctions on Tache.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1886

CTC IMPORTS AND EXPORTS
V.
NIGERIAN PETROLEUM CORPORATION,
GULF SHIPPING AGENCY (NIGERIA, LTD.),
UNIVERSE MARITIME PIREAUS,
MARZELLI, CASA,
MV "VYTINA",
NICHOLOS, CAPTAIN STRATIS,
RICE UNRUH,
RUSSEL, SHELTON, Individually and as
Representative of British Petroleum.
BRITISH PETROLEUM, SOHIO SUPPLY COMPANY
ADDAX OVERSEAS S.A. OF PANAMA
V.
INDAKWA, JOHN, SCHIEFEN, JACK, MATTHEW
A., THOMAS P., OLICKAN, JOSEPH, MATHAI,
THOMAS, OMUHAMBE, SHADRAH,
INTERNATIONAL MARITIME TRANSPORT, INC.
BEHRENS, WOLFGANG, LUDWIG, PETER, DOE,
JOHN ROE, JOHN, XYZ CORPORATION

CTC IMPORTS AND EXPORTS,
SIMON W. TACHE, ESQUIRE,
Appellants

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges and RONEY, Circuit Judge*

The petition for rehearing filed by L. Obioma Aham in the above-entitled case having been submitted to the judges who
participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ illegible
Circuit Judge

Dated: Jan 17 1992

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* Judge Roney, United States Senior Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation, voted only on panel rehearing.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL APPEAL INFORMATION STATEMENT

90-1886
APPEAL FROM DISTRICT COURT

DOCKET NO. 90-1886 EASTERN DISTRICT OF PENN.

CTC IMPORTS & EXPORTS, INC. D.C. Docket No. 89-01815

V. MARCH 13, 1989
Notice of Appeal filed: 11/21/90

NIGERIAN NATIONAL PETROLEUM CORP., ET AL

For Appellant(s):

L. OBIOMA AHAM 5959 WEST LOOP S #450, BELLAIRE, TX 77401 (713) 666-3115

SIMON W. TACHE 1700-06 RACE ST. PHILA., PA 19103

*For Appellees: (215) 567-4700

FAUSTINO MATTIONI 399 MARKET ST. 2ND FL., PHILA., PA 19106 (215) 629-1600

(OF MATTIONI, MATTIONI, & MATTIONI)

JAMES JOHNSON, 1818 MARKET ST. 32ND FL., PHILA. PA 19103 (215) 241-1864

(OF LADNER, CLARK FONTENBACH & YOUNG)

MARYELISA REEVES SUITE 1100, THE CURTIS CENTER, INDEPENDENCE SQ.WEST PHILA., PA 19106 (215) 923-4400

(OF KRUSEN, EVANS & BRYNE)

Is this a Cross-Appeal? [ ] Yes [XX] No

Was there a previous appeal in case? [ ] Yes [XX] No

To your knowledge, is there any case now pending or about to be brought before this Court or any other court or administrative agency which:

[A] Arises from substantially the same case or controversy as this appeal? [ ] Yes [XX] No

[B] Involves an issue that is substantially the same, similar, or related to an issue in this appeal? [ ]Yes [XX] No

NATURE OF SUIT

1. FEDERAL STATUTES

[X] OTHER (specify): (1)28 U.S.C. §1927
(2)RULE 11 OF FED.
RULES OF CIVIL PROC.

3. CONTRACTS

[XX] ADMIRALTY/MARITIME

5. OTHER

[XX] OTHER (specify):
FRAUD AND MISREPRESENTATION

ISSUES PROPOSED TO BE RAISED ON APPEAL:

1. WHETHER THE DISTRICT COURT'S FINDING THAT APPELLANTS CASE WAS FRIVOLOUS FROM THE START, THUS WARRANTING THE IMPOSITION OF RULE 11 SANCTIONS ON APPELLANT SIMON W. TACHE, ESQ, IS SUPPORTABLE BY THE FACTS OF THIS CASE AND THE LAW GOVERNING THE IMPOSITION OF SANCTIONS ON ATTORNEYS.

2. WHETHER APPELLANT, L. OBIOMA AHAM'S ENTRY OF APPEARANCE IN THE CASE CONSTITUTED SO ABUSIVE A BEHAVIOR AS TO VIOLATE THE PROVISION OF 28 U.S.C. §1927 AND THUS ATTRACTING THE

SANCTIONS IMPOSED BY THE DISTRICT COURT.

This is to certify that this civil appeal information statement was mailed to the Clerk of the U.S. Court of Appeals for the Third Circuit and a copy hereof served to each party or their counsel of record this 4th day of December, 199X.

/s/ L. Obioma Aham
(Signature of Counsel)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CTC IMPORTS AND EXPORTS,		
Plaintiff	:	CIVIL ACTION
	:	
v.	:	ATTORNEY I.D. #38711
	:	
NIGERIAN PETROLEUM	:	
CORPORATION, et al.,	:	NO. 89-1815
Defendants.	:	

NOTICE OF APPEAL

Notice is hereby given that Plaintiff CTC IMPORTS and EXPORTS, by and through its undersigned counsel, L. Obioma Aham, Esquire; and Simon W. Tache, Esquire, in his own right, hereby appeal to the United States Court of Appeals for the Third Circuit the Order by this Court of October 22, 1990, denying the motions of Simon Tache, Esquire and L. Obioma Aham, Esquire, for reconsideration of the court's Order imposing sanctions.

By /s/ Simon W. Tache,
Simon W. Tache, Esquire
SIMON W. TACHE, P.C.
1706 Race Street, 2nd Floor
Philadelphia, PA 19103
(215) 567-4700
I.D. #38711

By /s/ L. Obioma Aham
L. Obioma Aham
Attorney for Plaintiff

APPENDIX E
OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Sally Mrvos
Clerk

Telephone
215-598-3148

January 24, 1991

L. Obioma Aham, Esq.
5959 West Loop South
Number 450
Bellaire, TX 77401

RE: Docket No. 90-1886
CTC IMPORTS EXPORTS vs. Nigerian Petroleum
D.C. CIV. No. 89-01815

Dear Mr. Aham:

We are writing in regard to the brief submitted on your behalf in the above-entitled appeal.

When docketing the appeal this office did not read the notice of appeal as noticing an appeal on your behalf. See Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988); Kowaleski v. Director, OWCP, 879 F.2d 1173(3rd Cir.) cert. denied 110 S.Ct. 1114 (1990). specifically the notice stated, "Notice is hereby given that Plaintiff CTC IMPORTS and EXPORTS, by and through its undersigned counsel, L. Obioma Aham, Esquire; and Simon W. Tache, Esquire, in his own right, hereby appeal...." Since an appeal has not been docketed as to you, it would appear that you do not have the right to submit a brief in this matter.

A copy of this letter will be forwarded to the merits panel with the brief for a determination of whether the appeal should have been docketed as to you. The brief will not be filed as to you unless the Court directs. If you wish to advise the Court of any documents filed which might be treated as the functional equivalent of a timely notice of appeal, See Masquerade Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663 (3d Cir. 1990), or if you or any other party otherwise wish to respond to this letter, the responses will be forwarded to the merits panel for its consideration.

APPENDIX F

LAW OFFICES OF

CABLE ADDRESS
OCEAN LAW

ATTORNEYS-AT-LAW &
PROCTORS IN ADMIRALTY

SIMON W. TACHE, P.C.
A PROFESSIONAL CORPORATION
OCEAN LAW COMPLEX, SECOND FLOOR
1700-06 RACE STREET
PHILADELPHIA, PA 19103

TEL: (215) 567-4700
TELEX: 940-103
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February 7, 1991

Bradford Baldus, Esquire
Legal Coordinator
Office of the Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Phila., PA 19106-1790

HAND DELIVER

Re: Docket No. 90-1886
CTC Imports and Exports, et al. v. Nigerian Petroleum, et al.
D.C. Civ. No. 89-01815

Dear Mr. Baldus:

As you know, I am one of the Appellants in the above-captioned matter. I am writing in response to your letters of January 24 and 25, 1991, to L. Obioma Aham, Esquire, and

would request that this letter be forwarded on to the merits panel for its consideration.

Page Two

While the Notice of Appeal filed in this matter did read "Notice is hereby given that Plaintiff CTC Imports and Exports, by and through its undersigned counsel, L. Obioma Aham, Esquire; and Simon W. Tache, Esquire, in his own right, hereby appeal ...", it was the actual intention of the parties to have the appeal taken on behalf of all three separate parties--L.Obioma Aham, Esquire, as counsel for Plaintiff, CTC Imports and Exports; L. Obioma Aham, Esquire, in his own right; and Simon W. Tache, Esquire, in his own right.

The District Court's Order from which this appeal is taken denied a Motion for Reconsideration of an Order which imposed sanctions against three parties, Plaintiff, CTC Imports and Exports; Simon W. Tache, Esquire; and L. Obioma Aham, Esquire, jointly and severally. Accordingly, it is requested that this Honorable Court allow the appeal in this matter to be docketed as to all three of these parties, and accept for filing the Brief of CTC Imports and Exports and L. Obioma Aham, Esquire. The factual development in Mr. Aham's Brief provides the Court with the information it needs to fairly consider the appeal on the merits.
Thank you for your time and consideration.

Very truly yours,
/s/_____
SIMON W. TACHE

SWT/dle
cc: L. Obioma Aham, Esquire
Mary E. Reeves, Esq.
James W. Johnson, Esq.
Faustino Mattioni, Esq.